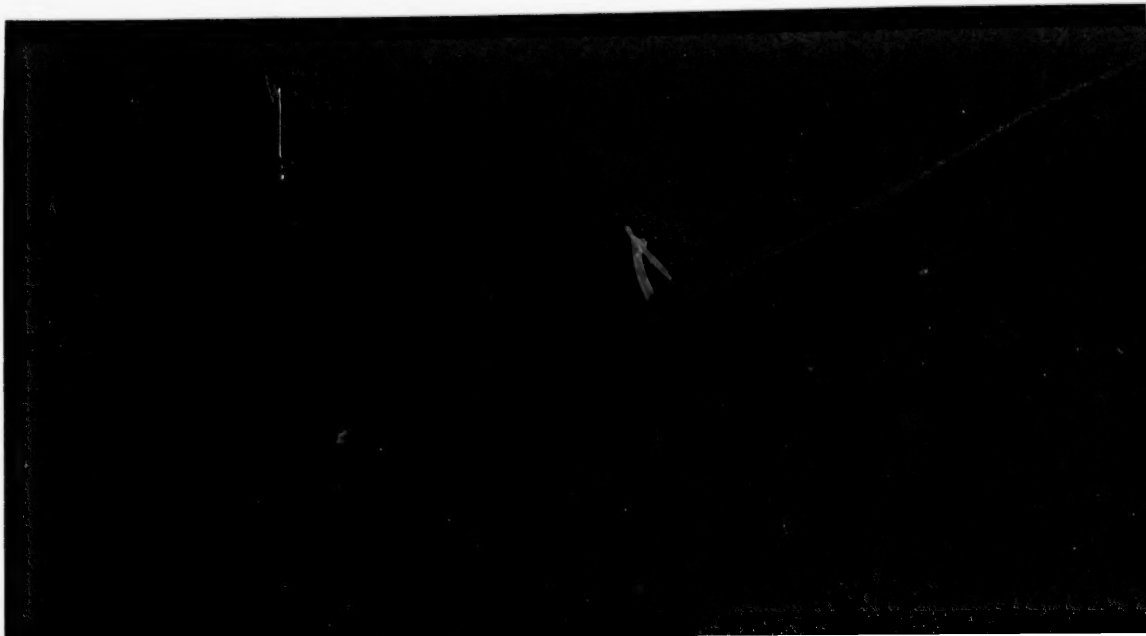

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 151.

GEORGE SCHEURMAN, D. E. DUMAS AND J. R. BEATSON,
Appellants,

vs.

TERRITORY OF ARIZONA.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This action was brought by the Territory of Arizona through its attorney-general, on the 2d day of September 1899, against the defendants, who constitute the board of supervisors of Yavapai county, for the purpose of compelling them to levy a tax of thirty-two cents on each $100 of valuation of the taxable property in said county for the purpose of paying the interest on certain territorial funding bonds issued by the Territory of Arizona, in lieu of certain bonds known as the P. & A. C. railroad bonds, theretofore issued by Yavapai county, maturing in the years 1898 and 1899, and to compel the defendants to levy a further tax of thirty-seven cents on each $100 of valuation of the property of said county for the purpose of paying the interest on said territorial funding bonds matur-

ing in the year 1900. An alternative writ of mandate was issued and served upon the defendants, and on the return day of said writ, September 13, 1899, defendants filed their answer and return. On the 14th day of September, 1899, the cause was submitted to the court for decision upon an agreed statement of facts, which statement of facts is adopted by the trial court as its findings of fact, and judgment was ordered and entered for the plaintiff as prayed in its complaint. A motion for a new trial was made and denied, and from the judgment and the order denying a new trial defendants prosecute this appeal.

The facts being agreed upon by the parties and fully set forth in the abstract, we do not deem it necessary to here make any further statement of the case, but will only refer to the agreed facts in the brief when they may be pertinent.

Assignment of Errors.

1st. The court erred in overruling the general demurrer of the defendants to the complaint of the plaintiff.

2d. The court erred in overruling the special demurrer of the defendants to the plaintiff's complaint.

3rd. The court erred in finding as a conclusion of law that these certain 258 railroad subsidy bonds issued by the county of Yavapai in aid of the construction of the railroad known as the Prescott & Arizona Central Railroad, extending from Seligman, Arizona, to Prescott, Arizona, were on the 17th day of September, 1897, valid, subsisting obligations of the county of Yavapai.

4th. The court erred in finding as a conclusion of law that the action of the loan commission of the territory of Arizona in funding said obligations and in issuing territorial funding bonds in lieu thereof was in all respects authorized and valid.

5th. The court erred in finding as a conclusion of law that said bonds so funded by said loan commission of the Territory of Arizona are valid and legal obligations of the county of Yavapai, and the county of Yavapai is liable for the same and for all the interest accruing on said bonds.

6th. The court erred in finding as a conclusion of law that the defendants herein are legally bound to levy and assess the sums of thirty-two cents on each $100 and thirty-seven cents on each $100 of valuation of all the taxable property in said Yavapai county.

7. The court erred in holding and deciding that the bonds mentioned in the complaint in this action, known as the P. & A. C. Railroad bonds, were legally funded after January 1, 1897, under the provisions of the act of Congress approved June 6, 1896.

8th. The court erred in holding and deciding that no demand for the funding of said bonds by the board of supervisors of Yavapai county was necessary in order that the same might be legally funded, under the provisions of said act of Congress, approved June 6, 1896.

9th. The court erred in holding and deciding that said P. & A. C. Railroad bonds, mentioned in the complaint herein, were legally funded at the meeting of the board of loan commissioners of the Territory of Arizona, on September 17, 1897, at which only two members of said board were present, the third member of said board not being present or acting, and not being in any manner consulted with reference to said funding.

10th. The court erred in rendering judgment in favor of the plaintiff upon the agreed statement of facts, adopted as the findings of fact.

11th. The court erred in not rendering judgment in favor of the defendants upon the agreed statement of facts, adopted as the findings of fact.

12th. The court erred in overruling defendants' motion for a new trial.

Argument.

In presenting the matters under discussion for consideration to this court, the counsel does so without the fear and trembling which characterized its presentation in the lower court. The particular matters under discussion are, as far as we can ascertain, foreign to this court inasmuch as a

curative act of the character of the act of June 6, 1896, has no exact counterpart. However, the principles of law applicable to this case are well settled and but for the decisions of the Supreme Court of the Territory of Arizona are all unquestionably with the appellants. At the time of the passage of the act of June 6th, there were many outstanding obligations of the Territory of Arizona (of counties, municipalities and school districts) which had been declared by this court to be absolutely void. The invalidity dated from their conception and it was not by subsequent legislation or acts of parties that they became so. They were conceived in fraud, born in iniquity and reared in a flagrant disregard to the law of the land.

We urge especially the following, which are presented in the Assignment of Errors, as cogent reasons why the judgment of the lower court should have been in favor of the appellants and why this court should so hold:

First. That the bonds in question were illegally funded, without any demand having been made by the board of supervisors of Yavapai county upon the Territorial Loan Commission for such funding.

Second. That said bonds were funded after January 1, 1897, and after the board of loan commissioners had any power so to do.

Third. That the bonds were improperly and illegally funded at a meeting of the board of loan commissioners of the Territory of Arizona, at a meeting at which only two members of the said board were present, the third member being absent from the territory and not in any manner consulted with reference to said funding. (Transcript of Record, page 30, Statement of the Facts.)

I.

As to the first point—that no demand was made by the authorities of Yavapai county for the bonds mentioned (Transcript of the Record, p. 29, paragraph 3, Statement of the Facts) and hence that such funding was invalid—it is

true that in the decisions of the Supreme Court of Arizona in *Bravin* v. *City of Tombstone*, 56 Pac. Rep. 719, and *Yavapai County* v. *McCord*, the Supreme Court of Arizona held that no demand was necessary. The act of Congress of June 25, 1890, authorized the funding of bonds "upon the official demand of said authorities" of the municipalities issuing the bonds sought to be funded. The Territorial Funding Act of March 19th, 1891, provides that "any person holding bonds of the character mentioned may exchange the same for territorial funding bonds as provided in that act." It is necessary in order to give the full effect to each of the acts, inasmuch as they both have in view the same purposes, that they should be considered together and their construction can admit of but one conclusion, namely, that the holders of the bonds may exchange them for bonds issued under the Territorial Funding Act *when official demand has been made by the municipal authorities for such funding*. Were the construction placed by the Supreme Court of Arizona upon the Territorial Funding Act of June, 1896, to prevail, then municipalities would be entirely at the mercy of holders of bonds, however illegal or invalid they might be. We take it that the purpose of the act was only to permit those political subdivisions which had invalid obligations existing (if indeed the term could be so used) to voluntarily assume their payment. No payment could be enforced in a court of law, but if it was desired, Congress sought to provide a way whereby these moral obligations could be discharged in a perfectly legal manner. It was the intention to permit the payment of void obligations simply to relieve those who might be liable in the event of payment and to permit the discharge of a moral obligation legally. No right, power or authority existed prior to the passage of the act of Congress for the payment of any of these illegal obligations. Only those were meant for the act itself especially designates them The act is in the nature of one of a class well known to the legislative power, namely, a relief act. Had Congress intended to make all outstanding obligations of the territory valid, it never would have made any proviso, but would

have simply stated that they should be valid obligations from and after the passage of this act, without any condition whatever. But, on the contrary, the act having been passed for the benefit of a favored few, and being remedial legislation, is subject to the most severe construction which can be placed upon it. It might have been possible, and is altogether probable, that at the date of the passage of the act referred to, litigation was pending in the proper forum for an adjudication upon the rights of the respective parties in reference to these particular bonds. Can it be inferred by any conceivable reasonable construction which can be placed upon the act in question that Congress had the desire to usurp in its legislative capacity the right which has always been delegated to the courts, namely, the adjusting of differences, the settlement of demands and claims and the adjudication of the rights of parties? It certainly appears that Congress desired only to permit the funding of invalid obligations upon the request of the party vitally affected by the payment of the same and who assumed to pay an obligation which the highest tribunal in the land had declared to be, and so by the act itself, declared.

The act of the loan commissioners in funding depended upon the special power conferred, their jurisdiction coming only upon the request of the party who was compelled to bear the burden. The construction of the act is akin to an acknowledgment in writing reviving a debt or obligation already barred by the statute of limitations. It must be voluntary and made without any restriction. It is admitted by the statement of facts that the bonds in question were illegal. The act of Congress was directed toward those particular bonds. The bonds in question might have been issued without consideration, the municipality might have had a perfect defense to an action upon them, they might have been utterly void for some reason other than want of power to issue them, and yet, if the construction placed upon the act of Congress by the Supreme Court of the Territory of Arizona is the correct one, their payment can be compelled by the funding process without the

knowledge or consent of the municipal authorities and without giving them any opportunity to be heard. Such a construction is not within reason and we urge that it could not have been the intention of either Congress or the Territorial legislature to bring about any such consequence.

The Supreme Court of the Territory of Arizona, in *Bravin* v. *City of Tombstone*, *supra*, held that obligations might be funded either upon demand of the authorities or at the request of the holders of the obligations. We call attention to the stipulated statement of facts and this court can not find nor does it exist as a matter of fact that any request for the funding of the Yavapai county bonds (the bonds in question) was ever made by the holders thereof. The stipulated statement of facts and as allowed by the Supreme Court of the territory shows simply that two members of the Board of Loan Commissioners of the territory, funded or attempted to fund the bonds referred to. An examination of the statement of facts will show (page 29, paragraph 3) that instead of favoring the funding of the bonds in question, there was a recision of the request formerly made by the proper municipal authorities of Yavapai county for the funding of these bonds and that due notice of the recision was given to the loan commission before any action was taken by it, thus leaving the matter as if no demand had been made at all. Consequently it does not appear that any demand was made by the holders of the bonds or by the municipality issuing them for their funding and the funding by the board of loan commissioners was an unwarranted usurpation of a power which had not been granted to them by any act of Congress or of the territory legislature, and a voluntary assumption of a debt of Yavapai county.

II.

Upon the second point it is the desire of the appellants to urge that the provisions of the acts of Congress of June 6, 1896, placed a limitation upon the time in which the bonds and obligations within mentioned might, under proper cir-

cumstances, be funded, and that the same could not be funded after January 1, 1897. This proposition has been before the Supreme Court of Arizona in the cases of *Gage* v. *McCord* and *Yapavai County* v. *McCord*, *supra*. Prior to the act of Congress above mentioned, bonds of the class issued under proper circumstances and of the same character as the bonds in question, had been held by this court to be absolutely void. *Lewis* v. *Pima County*, 155 U. S. 54. The act of Congress provided for the funding of outstanding obligations of the territory and the counties, municipalities and school districts thereof *until January 1, 1897*. The second section of the act provides, "and may be funded as in this act provided until January 1, 1897." By this act, Congress breathed life and validity into obligations that had been previously worthless. It was in the nature of a gift to the holders of the obligations in an amount equal to the face of the obligations and the accrued interest, and Congress might properly add such conditions to the gift as it saw fit. It required no extraordinary degree of foresight on the part of Congress to see that unless a limit was placed upon the time in which the holders of the rejuvenated bonds might take advantage of the rights therein granted, that a multitude of questions productive of litigation and subversive to the spirit and intent of the act, might arise. To avoid such a consequence it seems that Congress properly fixed a definite time within which the holders of the validated obligations might avail themselves of the privileges granted, and that after the expiration of that time their rights under the act were at an end. It would seem that it is impossible to prepare an act with the intention to therein place a limitation of the time within which bonds might be funded in stronger terms. No more strenuous language or more explicit prohibition could be inserted than in the act of June 6, 1896. No conceivable grammatical construction of the language used in sections one and two of the act of Congress will allow of a different view. The purpose of Congress in passing the act was to place a limit upon the time within which

the obligations might be funded and not a time prior to which obligations must have existed. No court could assume that it was the intention of Congress to grant any other right than that which it did grant.

Why should that view be indulged? It appears in the mind of this court in *Utter* v. *Franklin*, *supra*, that the remedy existed only for the benefit of the obligations created prior to the passage of the act. If the act was to apply to the indebtedness created after its passage (until January 1, 1897), it was in effect a license for the political divisions to create any sort of a void obligation, demand their funding, and thus burden the taxpayers, without them being advised either of their creation, character or funding.

Such construction must either repeal or suspend the Harrison act for the period from June 6 to January 1.

It will be contended by counsel for appellee that the decision of this court, *Utter* v. *Franklin*, *supra*, wherein it was ordered that a mandamus issue, is indicative that the funding might take place after January 1, 1897. We apprehend that the court in rendering that judgment did so upon the rights which existed at the date of the trial in the court below. The point, it seems, considered, was as to whether the right existed at the date of the institution of the suit. The fact that the time had elapsed could certainly make no difference, especially so to a matter not before the court.

If a judgment were rendered upon a note and there was a defense interposed which would avail defendant nothing and judgment be rendered against him, the veriest tyro in the law would not seriously contend that the judgment would avail a plaintiff upon a suit for the collection of another note where suit was not brought within the period of limitation. The rights of the parties were preserved at the date of the institution of the suit and rights upon other or similar contracts can only be enforced when those matters are called in question. As a matter of fact, the opinion of this court does not show that any consideration was paid, nor did we see how any could be, as to the date

of the funding. Mr. Justice Brown, in rendering the opinion, uses the language of the act as follows:

"The second section deals with the original bonds which had not authoritatively been funded and provides that all such as had been authoritatively issued under the authority of the legislature and which by the first section are authorized to be funded, should be confirmed, approved and validated and might be funded until January 1, 1897."

This language can admit of but one construction and we think that construction was in the language of the court in rendering the opinion. The expression used in the act of Congress of June 6, 1896, referring to the bonds validated as those *heretofore issued*, we assert, shows clearly that the act was only intended to apply to the outstanding obligations then existing at the time of the passage of that act. This being true, we are unable to see the force of the construction of the Supreme Court of Arizona in holding that the language "until January 1st, 1897," applied to existing obligations incurred before that time. The very purpose of the act determines that it did not apply to any indebtedness of the character described, except such as existed prior to June 6, 1896. What was it could be done until January 1, 1897? The answer is obvious. The bonds issued prior to June 6, 1896, might be funded as provided by the act. Congress had twice previous to the act under discussion been called upon to act in reference to Arizona bonds and it is but reasonable to suppose that in the passage of this act, the hope was indulged that no further recurrence of the matter would ever be necessary and that the holders of these invalid obligations would eagerly avail themselves of an opportunity to exchange them for a legal obligation. Congress had the same right to place a limitation upon the time as the various legislative bodies have to provide the time in which one must proceed in the enforcement of any legal right. If the holders of these bonds did not care to avail themselves of the privileges of the act of Congress, they retained their original standing before the passage of the act.

It may be said in passing, in reply to the opinion of the Supreme Court of Arizona rendered in the case of *Gage* v. *McCord*, 51 Pac. 977. That the time within which the holders of the bonds were required to act was ample and had Congress desired to grant further time, there is no reason to assume it would have failed to do so. While the court says it is not to be assumed "that Congress would in one breath grant liberal and generous concessions and in the next breath take away their practical benefits by the imposition of a seemingly unreasonable and unnecessary restriction and thus defeat its own purpose and intent," yet we can not see why the full benefit and intent of the act could not be satisfied in six months. Be that as it may, the question of extending a right which Congress has granted is not involved, but if assumptions are indulged in, it is but fair to believe that the holders of these worthless bonds would eagerly avail themselves of the beneficient provisions and all of the provisions of the act of Congress.

III.

The findings of facts show that the alleged funding of the Yavapai county bonds mentioned took place at the meeting of the board of loan commissioners at which only two members of the board were present and acted and that the third member was absent from the territory and was not present at said meeting and took no part therein and was in no manner consulted with reference to the funding of said bonds, statement of the facts, page 30, paragraph 5. This constitutes the third objection to the validity of the funding.

In disposing of this question it is necessary to determine as to what the board of loan commissioners was, how created, and the necessity of their creation. The Supreme Court of the Territory of Arizona has held in *Utter* v. *Franklin*, *supra*, that the board of loan commissioners derived its power and was the creature of the act of Congress, while in the case at bar they hold that the board of loan commis-

sioners was a creature of the territorial legislature. It is asserted that the board of loan commissioners was created by the act of Congress of June 25, 1890, by the use of the following language:

"For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, and such future indebtedness as may be or is now authorized by law, the governor of said territory, together with the territorial auditor and territorial treasurer and their successors in office shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona and shall exercise the powers and perform the duties hereinafter provided."

At the date of the passage of this act there was no such thing as a board of loan commissioners in the Territory of Arizona. It is true that the territorial legislature subsequently passed an act creating a board, but that board could only act under and by virtue of the act of Congress, for had not Congress permitted them to fund the indebtedness, no act of the territorial legislature could have done so, hence all of the powers exercised and enjoyed by the board of loan commissioners were derived from the only source of power, namely, the act of Congress.

In determining the character of the capacity in which a board shall act, the purpose of their action must be considered. The board of loan commissioners of the territory consisted of the three officers named. Their duties were *quasi* judicial. By their action the credit of the territory could be pledged by the redemption of bonds similar to those under consideration. The credit of the entire territory was pledged by such action as they might take even though the mere act of funding might be ministerial, still the acts which lead up to (and necessarily a part of) the funding were judicial in their character. It is insisted that a board of this character could not act through a majority of its members in the absence of the other member and that any act performed at such a meeting is void. The rule stated by Chancellor

Kent is, "that any matters of public trust, or powers conferred for public purposes, if all meet, the acts of the majority will bind." What board could be more public? Certainly no board that has ever been created for the Territory of Arizona was possessed of such public and widespread power. Its action affected the entire public. Every citizen owning taxable property within the entire territory would necessarily be affected by its action. In *People* v. *Coghill*, 47 Cal. 361, the Supreme Court of California, in passing upon the acts of two or three commissioners, under a statute providing for the appointment of three, held: "Where the act itself did not provide that a majority of the board should constitute a quorum, the acts of two of the board were clearly illegal even though the third had written that he did approve the action of the majority." The act of Congress does not provide that a majority shall act and simply that the three shall constitute a board with power to do the things therein specified.

In the case of the *First National Bank of North Bennington* v. *Mt. Tabor* (Vt.), 36 Am. Dec. 735, the Supreme Court of Vermont cites with approval the case above mentioned and states the rule as follows:

"The general rule in matters of public interest, the majority of those upon whom the power is conferred is recognized, provided all meet and confer, but not when the minority is ignorant of the transaction and has no legitimate opportunity to exercise its influence in the deliberations; or when the act in its terms requires the presence and concurrence of all."

Sutherland on Statutory Construction, page 500, tersely states the rule:

"Where any number of persons are appointed to act in a public manner they must all confer, but a majority may decide."

Also:

Crocker v. *Crane*, 21 Wend. 218.
Babcock v. *Lamb*, 1 Cowen, 238.
Exparte v. *Rogers*, 7 Cowen, 526.

McCoy v. *Curtice*, 9 Wend. 17.
Green v. *Miller*, 6 Johns. 41.

It may be contended that the act of the territorial legislature (Revised Statutes, 1887, 361) created a board of loan commissioners, hence that the board derived its power from the act of the legislature. On the contrary it can not be shown that the board, even though it did exist at the date of the passage of the act of Congress, June 25, 1890, possessed any legal power; certainly not to fund the bonds in question. That power and authority comes alone from Congress and the act under which they were funded is an amendment beyond any question to the act of June 25, 1890, which last act creates the board. As we have already said, the Supreme Court of the territory has held the board to be a creature of the act of Congress, and also of the territorial legislature. The court is undoubtedly correct; it is certainly one or the other. At no place has Congress given the majority of the board power to transact business, hence the rule laid down by the authorities shows that the pretended meeting of the board of loan commissioners on September 17, 1897, was not a meeting of the board. The board had no power to act, and even though they had, we suggest, in closing, and the point is respectfully urged upon the court, that their action was wholly illegal. Were it possible to arrive at any other conclusion, the action of the board at best was but a voluntary assumption upon the part of the territorial authorities of a debt of Yavapai county, wherefore, by reason of the law, judgment should be for the appellants.

Respectfully submitted,

Reese M. Ling.

Attorney for Appellants.